92-339

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DR. RICHARD K. BOWERS,
Petitioner,

VS.

WESLEY TAYLOR,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a physician who treats, rather than ignores, a prisoner's serious medical condition entitled to qualified immunity, when there is no expert evidence that the physician's treatment is such a substantial departure from accepted professional treatment as to be deliberately indifferent?

2. Does the Eleventh Amendment to the United States Constitution bar a pendent state-law negligence claim for damages against a state official in his individual capacity?

LIST OF PARTIES

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit were the petitioner, Dr . Richard K. Bowers, and the respondent, Wesley Taylor. Dr. Kent Grewe and Dr. Carl R. Doerhoff were separate appellants in the court below, which held that they were entitled to qualified immunity on the federal claims against them. Therefore, they are not named as parties herein.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Dr. Richard K. Bowers, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on June 10, 1992.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is not yet reported, and is reprinted in the appendix hereto at page A-1 and A-18. The Order of the District Court is not reported, and is reprinted in the appendix hereto at page A-13. The Report, Recommendation, and Order of the Magistrate is not reported, and is reprinted in the appendix hereto at page A-14.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1331 and the doctrine of pendent jurisdiction, the respondent brought this suit in the United States District Court, Western District of Missouri. The District Court denied petitioner's motion for summary judgment based upon qualified immunity. See pages A-13 and A-14 herein.

On petitioner's appeal, the Court of Appeals for the Eighth Circuit, on June 10, 1992, entered a judgment and opinion affirming the District Court's order with respect to petitioner. See page A-1 herein. A timely petition for rehearing or rehearing en banc was filed on June 24, 1992, and was denied on July 31, 1992. See page A-18 herein. The Court of Appeals also on July 31, 1992, modified its opinion. See page A-18 herein. The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondent Wesley Taylor, a prisoner at the Missouri State Penitentiary in Jefferson City, Missouri, brought a 42 U.S.C. § 1983 and a pendent state-law negligence action alleging that petitioner Dr. Richard K. Bowers and Dr. Kent Grewe and Dr. Carl R. Doerhoff were deliberately indifferent to the prisoner's serious medical needs by intentionally delaying surgery for his ruptured appendix in an effort to coerce an admission that he had swallowed drug-filled balloons. After discovery had been completed, which included interrogatories, requests for production of documents and depositions, all three physicians moved for summary judgment. With respect to the prisoner's civil rights claim, the physicians moved for summary judgment on the basis of qualified immunity, claiming that they did not know and should not have known that their actions violated the prisoner's constitutional rights. With respect to the prisoner's state-law negligence claim, the physicians moved for summary judgment

on the basis that the Eleventh Amendment bars state-law claims against state officials in federal court.

In opposition to the motion for summary judgment, the prisoner submitted the affidavit of a fourth physician, stating that prior to the prisoner's exploratory surgery, the prisoner was never treated for pain, received no hydration or provision for maintenance of his nutritional status, no identifiable course of medical treatment was ordered or prescribed, no identifiable course of diagnostics was ordered, a surgical consult was not obtained, his medical condition worsened, yet he received no medical treatment; and that subsequent to his exploratory surgery, he was not seen or examined on a daily basis by any physician. The prisoner was also permitted to file a Second Amended Complaint. The District Court, relying upon this affidavit, denied the motion for summary judgment, ruling that none of the three physicians were entitled to qualified immunity.

The Court of Appeals reversed the denial of summary judgment with respect to Dr. Grewe and Dr. Doerhoff, ruling that they were entitled to qualified immunity. Dr. Grewe admitted the inmate to the hospital on February 1, 1987, for observation for a small-bowel obstruction. At that time, the prisoner exhibited a generalized, fairly non-specific-type of abdominal pain, no rebound tenderness (a common symptom of a ruptured appendix), a normal white blood cell count, normal bowel movement, and no nausea or vomiting. No one, including the prisoner, told Dr. Grewe that the prisoner had vomited blood. Dr. Grewe's clinical notes did not indicate that the prisoner had vomited blood or that he was suspected of swallowing drug-filled balloons. Dr. Grewe was not aware that others suspected that the prisoner had swallowed contraband. Dr. Grewe ordered a full liquid diet; Reglan, 20 milligrams, three times a day, and Phenergan, 25 milligrams, through the mouth or intramuscularly every six hours (a medicine which indirectly eases minor pain); no further laboratory work except obtaining a stool specimen for

ova and parasites and a urinalysis; vital signs four times a day; and no intravenous fluid. Dr. Grewe left the hospital at the end of his shift that day and did not return until February 10, 1987.

Dr. Doerhoff performed a celiotomy on February 4, 1987, and discovered a ruptured appendix and liquid stool throughout the prisoner's abdomen. Before performing surgery, Dr. Doerhoff was of the opinion that the prisoner had a small-bowel obstruction, because he lacked the high white blood cell count and rigid abdomen characteristic of most appendicitis patients. Dr. Doerhoff was aware that the prisoner was suspected of swallowing contraband. Dr. Doerhoff was also of the opinion that the possibility that the prisoner had swallowed contraband was within the differential diagnosis, because it was common for prisoners to swallow lots of things, including contraband. Dr. Doerhoff was also of the opinion that there was no delay in surgery considering the prisoner's symptoms, white blood cell count, and temperature .

The Court of Appeals affirmed the denial of summary judgment with respect to Dr. Bowers, ruling that he was not entitled to qualified immunity The Court of Appeals reasoned that there was sufficient evidence to create a genuine issue as to whether Dr. Bowers delayed surgery in order to coerce a confession that the prisoner had swallowed drug-filled balloons. Dr. Bowers was the prisoner's attending physician while he was hospitalized prior to his surgery. During his hospitalization and prior to his surgery, the prisoner vomited blood, and a nasogastric tube was inserted. At 9:00 a.m. on February 3, Dr. Bowers learned that the prisoner had removed the nasogastric tube, and he ordered an x-ray which showed a small-bowel obstruction. At noon on February 3, Dr. Bowers became aware that the prisoner was suspected of swallowing contraband. Thereafter, Dr. Bowers questioned the prisoner about whether he had swallowed contraband, the prisoner denied swallowing anything, and Dr. Bowers believed the prisoner's denial and urged him to permit the

reinsertion of the nasogastric tube. The prisoner agreed to reinsertion of a nasogastric tube, but removed it at 6:30 p.m. on February 3, and subsequently twice refused its reinsertion. The prisoner vomited more blood. At 5:20 p.m. on February 4, Dr. Bowers requested Dr. Doerhoff to perform surgery. Dr. Bowers would have called the surgeon sooner had the prisoner kept the nasogastric tube in place or had he disbelieved the prisoner's denial of swallowing contraband.

Because the Court of Appeals considered Dr. Grewe and Dr. Doerhoff to be entitled to qualified immunity, it discussed whether the Eleventh Amendment bars the state-law negligence claim with respect to Dr. Bowers only. The Court of Appeals reasoned that *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 117 (1984), prohibits a federal suit against state officials on the basis of state law only when the sought-after relief has a direct impact on the state. The Court of Appeals was incorrect when it asserted that Dr. Bowers was sued in his official, in addition to his individual, capacity, because the prisoner does seek any injunctive or declaratory relief, and Dr. Bowers is no longer an employee of the state.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, WHEN IT DENIED QUALIFIED IMMUNITY TO A PHYSICIAN WHO TREATED, RATHER THAN IGNORED, A PRISONER'S SERIOUS MEDICAL CONDITION, AND THERE WAS NO EXPERT EVIDENCE THAT THE PHYSICIAN'S TREATMENT WAS DELIBERATELY INDIFFERENT.

On motion for summary judgment based upon qualified immunity, when a physician adduces evidence of the course of his treatment of a prisoner and the reasons for it, the physician should be entitled to qualified immunity, unless the prisoner responds with expert evidence that the physician's treatment was such a substantial departure from accepted professional judgment as to be deliberately indifferent. This rule is similar to that of *Youngberg v. Romero*, 457 U.S. 307, 323 (1982), which requires, for proof of violation of the involuntarily civilly committed's Fourteenth Amendment rights, that a physician's or other professional's treatment was a substantial departure from accepted professional judgment. This rule is dissimilar to that of *Youngberg v. Romero* in that it requires expert evidence to show deliberate indifference, rather than such evidence to show the absence of professional judgment. This case, and others, illustrate that such a rule is needed to protect physicians from prisoners' medically unsubstantiated Eighth Amendment claims.

In this case, the prisoner argued that the physician delayed surgical intervention in order to coerce him into admitting that he swallowed drug-filled balloons. The physician argued that he was treating the prisoner for a small-bowel obstruction by reinsertion of a nasogastric tube to induce spontaneous relief, and

reevaluation after decompression occurs or not. The Court of Appeals denied qualified immunity to the physician, reasoning that the physician's questioning of the prisoner about whether he swallowed contraband, *not* the prisoner's expert evidence, created a genuine issue as to whether the physician delayed surgical intervention to coerce the desired-for admission. The Court of Appeals believed such an issue existed, in spite of the fact that the surgeon, upon whom it bestowed qualified immunity, testified that in his opinion the possibility that the prisoner swallowed contraband was within the differential diagnosis and there was no delay in surgery, considering that the prisoner did not have a high white blood cell count or rigid abdomen; and in spite of the fact that the Court stated that the affidavit of the fourth physician, upon which the Magistrate relied to recommend denial of qualified immunity, "merely creates an inference of negligence upon the part of all the defendants " (Appendix, A-9.)

As the Court of Appeals recognized, the expert evidence adduced by the prisoner in response to the motion for summary judgment does not express an opinion that the physician's treatment was such a substantial departure from accepted professional judgment as to be deliberately indifferent. The prisoner's expert evidence merely expresses a difference of medical opinion over whether the prisoner needed more hydration and nutrition than Dr. Grewe ordered, and whether the prisoner needed surgical intervention sooner than Dr. Bowers thought. Dr. Bowers did, in fact, order a course of diagnostics and treatment — reinsertion of a nasogastric tube to spontaneously relieve the small-bowel obstruction, and reevaluation after decompression occurs or not.

Though not cited in its opinion as authority, *Smith v. Jenkins*, 919 F.2d 90 (8th Cir. 1991), illustrates the Court of Appeals' reasoning. In that case, prior to his incarceration, Smith was prescribed medication for a psychiatric disorder. Upon incarceration, a physician examined Smith and terminated his medication based upon the physician's clinical judgment that the

medication was not medically indicated. The District Court granted summary judgment to the physician based upon the physician's affidavit, which apparently was not responded to by the prisoner. The Court of Appeals reversed, holding that Smith was entitled to prove that the physician's course of treatment, or lack thereof, so deviated from professional standards that it amounted to deliberate indifference.[1]

As shown by this case and *Smith v. Jenkins*, the Court of Appeals has decided that a physician who treats, rather than ignores, a prisoner's serious medical condition is not entitled to qualified immunity, though there is no expert evidence that the physician's treatment is deliberately indifferent. Such a rule does not protect physicians from medically unsubstantiated Eighth Amendment claims.

II. THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT'S DECISION THAT THE ELEVENTH AMENDMENT DOES NOT BAR A PENDENT STATE-LAW NEGLIGENCE CLAIM FOR DAMAGES AGAINST A STATE OFFICIAL IN HIS INDIVIDUAL CAPACITY CONFLICTS WITH THE COURT OF APPEALS FOR THE FIFTH CIRCUIT'S DECISION ON THE SAME MATTER.

Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 106 (1984) (*Pennhurst II*), bars claims based on violations of state law and seeking prospective or retroactive injunctive relief against state officials in their official capacity. When a suit is brought against state officials, as opposed to the state itself or its agencies, suit is barred when "'the state is the real, substantial

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[1] This case is unlike *Smith v. Jenkins* in that the prisoner in this case obtained expert evidence, which was insufficient, whereas Smith was denied even an opportunity to obtain such evidence. *Smith v. Jenkins*, *supra*, 919 F.2d at 93, n. 4.

party in interest."' *Pennhurst, supra,* 465 U.S. at 101, quoting *Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459, 464 (1945). The state is the real party in interest if the decision rendered in a case would operate against the sovereign, expend itself from the public treasury, interfere with public administration, or compel the state to act or refrain from acting. *Pennhurst, supra,* 465 U.S. at 101; *Dugan v. Rank*, 372 U.S. 609, 620 (1963).

Pennhurst II applies to claims based on violations of state law and seeking damages against state officials in their individual capacity. The state is the real, substantial party in interest "because the State poses a paramount interest [as opposed to the federal government] in overseeing the nature and extent of the common-law liability imposed by its courts, and defining the immunity available to its officials." *Hughes v. Savell*, 902 F.2d 376, 378 (5th Cir. 1990) (holding the Eleventh Amendment bars a state-law negligence claim for damages against a state official in his individual capacity); see also *Rannels v. Hargrove*, 731 F. Supp. 1214, 1217 (E.D. Pa. 1990). Any federal judicial award of damages, or any federal judicial ruling concerning the nature and extent of state-law negligence liability and the defenses thereto, would interfere with public administration, because either a damages award or an interpretation of state law indirectly affects the conduct of state officials. Any judgment against a Missouri official would be paid from the state treasury. Mo. Rev. Stat. § 105.711 (1991 Cum. Supp.).

The Court of Appeals' citations to *DeYoung v. Patten*, 898 F.2d 628, 635 (8th Cir. 1990), and *Nix v. Norman*, 879 F.2d 429, 432-433, & n. 3 (8th Cir. 1989), for the proposition that the Eleventh Amendment does not bar a suit for damages against a state official in his individual capacity, are inapposite. Neither case involves a state-law or an individual-capacity claim. There is no official-capacity claim involved in this case because the prisoner seeks only damages and the physician is no longer a state official.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2539

Wesley Taylor,
Appellee,

v.

Richard K. Bowers; Carl Doerhoff; Kent Grewe,
Appellants.

Maryland Butts; Helen Farr; Loren Stout.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: February 12, 1992
Filed: June 10, 1992

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and LOKEN, Circuit Judge.

BRIGHT, Senior Circuit Judge.

I. INTRODUCTION

Appellants Richard K. Bowers, D.O., Kent Grewe, M.D., and Carl R. Doerhoff, M.D., each of whom is sued individually and in his official capacity as an employee of the Missouri Department of Corrections and Human Resources, appeal from the district court's denial of their motion for summary judgment on appellee Wesley Taylor's claims under 42 U.S.C. § 1983 (1988). On appeal, they allege: (1) they are entitled to summary judgment on the basis of qualified immunity and (2) the eleventh amendment bars Taylor's state law malpractice claims. We conclude that summary judgment is appropriate for Grewe and Doerhoff, who are entitled to qualified immunity, but not for Bowers. Accordingly, we affirm in part and reverse in part.

II. BACKGROUND

Wesley Taylor is an inmate at the Missouri State Penitentiary [MSP] in Jefferson City, Missouri. He alleges that in the early morning of February 1, 1987, he experienced stomach pains and vomited blood. Taylor reported to the MSP hospital at approximately 1:00 p.m., where he was examined by Dr. Kent Grewe. Taylor alleges that he told Grewe that he had repeatedly thrown up blood and experienced a severe burning pain in his stomach. Taylor also alleges that Grewe questioned him about drug ingestion, which Taylor denied.

After an examination, Grewe concluded that Taylor had a small bowel obstruction. Grewe admitted Taylor to the MSP hospital for observation. Taylor alleges that he continued to experience severe pain and vomit blood. In the evening of February 2, Taylor alleges, a (non-defendant) doctor recommended the transfer of Taylor to the University of Missouri-Columbia Medical Center "ASAP." This transfer failed to materialize until two weeks later. Taylor alleges that on February 2 or 3, nurse Karen Zumwalt told him that Doctors Grewe and Bowers suspected that he had swallowed drug-filled balloons. Zumwalt also indicated, according to Taylor, that nothing would be done for him until he confessed to swallowing the balloons. Taylor denied the accusations.

Taylor alleges that he continued to experience great pain and vomit repeatedly. On February 4, after allegedly being subjected to repeated questioning by nurses and doctors about the drug-laden balloons, Dr. Doerhoff performed exploratory surgery. Doerhoff found that Taylor's appendix had ruptured. Doerhoff removed the appendix and treated Taylor.

Taylor alleges that he continued to experience stomach pains and vomiting after the surgery. He was transferred to the University of Missouri-Columbia Hospital on February 16. Doctors performed a second surgery to drain an abscess. Taylor

alleges that Doerhoff's improper treatment necessitated the second surgery.[1]

Taylor sued Grewe, Doerhoff and Bowers under 42 U.S.C. § 1983, 42 U.S.C. § 1985, and state negligence law. In his section 1983 claim, set forth in count I, he alleged that the defendants had been deliberately indifferent to his serious medical needs. In his section 1985 claim (count II), he alleged that the defendants conspired to deprive him of urgently needed medical treatment in violation of his rights under the fourteenth amendment and section 1983. Count III set forth the bases for Taylor's negligence claims against Grewe, Bowers and Doerhoff.

The defendants moved for summary judgment on counts I and II, raising the defense of qualified immunity. They also moved to dismiss the negligence count for lack of jurisdiction. After reviewing the depositions, suggestions and affidavits submitted by the parties, the Magistrate Judge concluded that a dispute over material facts precluded the entry of summary judgment. Specifically, the Magistrate Judge relied upon the affidavit of Dr. Glenn A. Barr, which stated that Taylor did not receive necessary medical care. Barr also stated that the deficiency of the pre- and post-operative care damaged Taylor.[2] App. 464-65. After de novo review of the record, the district court denied the defendants' summary judgment motion. App. 471. This appeal followed.

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[1] The preceding overview represents a summary of the factual allegations before the district court at the summary judgment phase. We will elaborate upon the facts established by the record as necessary to dispose of Taylor's arguments on appeal.

[2] Counsel for Taylor conceded at oral argument that Barr is not qualified as an expert in prison treatment.

III. DISCUSSION

As a preliminary matter, we note that we have jurisdiction to hear this appeal even though the district court has not yet rendered a final judgment. To the extent that a district court's denial of a claim of qualified immunity turns upon an issue of law, the denial is an appealable final decision within the meaning of 28 U.S.C. § 1291 (1988), notwithstanding the absence of a final judgment. *Johnson v. Hay*, 931 F.2d 456, 459 (8th Cir. 1991) [*Hay*] (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)); *Givens v. Jones*, 900 F.2d 1229, 1231 (8th Cir. 1990) (citing 472 U.S. at 530). Even when an appeal from the denial of summary judgment implicates fact-based issues, we have held that we have jurisdiction when the record fails to establish a triable issue of fact and can be decided as a matter of law, *Hay*, 931 F.2d at 460 (citing *Wright v. South Arkansas Regional Health Ctr., Inc.*, 800 F.2d 199, 203 (8th Cir. 1986)) or when the appeal presents the largely legal question of whether an official's acts violate clearly established law of which a reasonable person would have known. *Id.* We thus have jurisdiction over the instant appeal.

The case law that governs whether the defendants are entitled to qualified immunity defense is well established. *See, e.g., Givens*, 900 F.2d at 1231. Government officials are shielded from liability under section 1983 for the performance of discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citations and footnote omitted). "Clearly established" law, the Supreme Court has explained, means "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The burden on the section 1983 plaintiff at the summary judgment phase is also well defined. When the plaintiff fails to allege a violation of clearly established law, "a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell*, 472 U.S. at 526 (citing *Harlow*, 457 U.S. at 818). Even when the plaintiff competently alleges the commission of acts that violate clearly established law, "the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." *Id.*; *see also Hay*, 931 F.2d at 460 (defendant entitled to summary judgment if discovery failed to uncover sufficient evidence to create a genuine issue as to whether his conduct violated clearly established law); *Johnson v. Boreani*, 946 F.2d 67, 70 (8th Cir. 1991) [*Boreani*] (same).

We review the district court's denial of summary judgment de novo, applying the same standard the district court invoked to decide the motion. *Hay*, 931 F.2d at 460. Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We view the evidence in the light most favorable to the non-moving party and draw all reasonable inference in favor of the non-moving party. *Hay*, 931 F.2d at 460 (citation omitted).

Taylor seeks to recover via section 1983 under the eighth amendment, which prohibits cruel and unusual punishment. Cruel and unusual punishment constitutes the " 'unnecessary and wanton infliction of pain.' " *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion)). In order to demonstrate an eighth amendment violation upon the basis of inadequate medical care, a prisoner must allege acts or omissions that reveal "deliberate indifference to serious medical needs." *Estelle*, 429 U.S. at 104, 106. A physician's mere negligent failure to diagnose or treat a condi-

tion fails to state a valid claim of mistreatment under the eighth amendment. *E.g., id.* at 105-06; *Givens*, 900 F.2d at 1231.

Taylor essentially alleges that the defendants withheld medical treatment in order to coerce him into confessing that he ingested drug-filled balloons. At the time in question, February 1987, the law in this circuit was "clearly established" within the meaning of *Harlow*. 457 U.S. at 818. This court has repeatedly held that a prisoner's mere difference of opinion over matters of expert medical judgment or a course of medical treatment failed to rise to the level of a constitutional violation. *E.g., Randall v. Wyrick*, 642 F.2d 304, 308 (8th Cir. 1981) (citations omitted); *Martin v. Sargent*, 780 F.2d 1334, 1339 (8th Cir. 1985) (citation omitted). Nor was an alleged delay in the receipt of medical treatment sufficient to state a claim of deliberate indifference in and of itself. *Compare Fields v. Gander*, 734 F.2d 1313, 1315 (8th Cir. 1984) (county sheriff allegedly delayed prisoner's access to dental care for three weeks to compel payment of bill for earlier dental services) *with Mills v. Smith*, 656 F.2d 337, 340 (8th Cir. 1981) (record failed to support prisoner's allegations that officials said he could go to the hospital only after he made a statement favorable to the police officer who accidentally shot him). An allegation of deliberate indifference to an inmate's need for surgery, however, was sufficient to state a section 1983 claim. *See, e.g., Toombs v. Bell*, 798 F.2d 297, 298 (8th Cir. 1986) (prison nurse and doctor allegedly ignored inmate request for treatment of gallstones, making surgery to remove gallbladder necessary) (citations omitted); *Johnson v. Clinton*, 763 F.2d 326, 328 (8th Cir. 1985) (warden allegedly refused to approve necessary hernia operation and assigned inmate to excess work detail); *Cotton v. Hutto*, 540 F.2d 412, 415 (8th Cir. 1976) (prison official allegedly refused to grant request for hernia operation). Thus, a reasonable prison official in February 1987 would have understood that deliberate indifference to an inmate's need for surgery for a ruptured appendix violated clearly established eighth amendment law.

Taylor's basic allegation would be sufficient, we believe, to state a violation of clearly established eighth amendment law. If Grewe, Doerhoff and Bowers are to succeed with their defense of qualified immunity, therefore, it must be for the second reason set forth in *Mitchell*: Taylor's failure to uncover sufficient evidence to create a genuine issue as to whether the defendants committed the allegedly unlawful acts. 472 U.S. at 526. As for Grewe and Doerhoff, we conclude that this is the case.

A. Grewe

The appellants contend that Dr. Grewe neither knew nor should have known that his conduct on February 1, 1987 violated Taylor's constitutional right to treatment of a serious medical condition. Appellants' Br. at 16. Nor does the evidence support an inference that Grewe withheld treatment in order to coerce a confession about drug-filled balloons. *Id.* at 17. Taylor asserts that the evidence permits an inference that (1) Grewe knew or should have known that Taylor was admitted with pain and nausea; (2) Taylor as dehydrated and vomiting blood; (3) Taylor's serious condition required an immediate surgical consult; and (4) Taylor was under suspicion for swallowing contraband. Appellee's Br. at 13.

In his deposition, Grewe stated that Taylor "exhibited a generalized fairly nonspecific-type of abdominal pain." App. 59. Grewe found that Taylor had no "rebound tenderness," a common symptom of an inflamed appendix. *Id.* at 62, 64-65. Taylor had a normal white blood count, a normal bowel movement and no nausea or vomiting. *Id.* at 69.

After completing a physical examination and reviewing lab results and x-rays, Grewe concluded that Taylor suffered from abdominal pain of unknown etiology. *Id.* at 61. He decided to err "on the conservative side" and had Taylor admitted to the hospital for observation. *Id.* at 60-61, 66. Neither Taylor nor anyone else told Grewe that the inmate had vomited blood. *Id.*

at 69. Nor do Grewe's clinical notes from the February 1 examination make any mention of contraband or vomiting blood. *Id.* at 128. The nurses who knew about the balloon rumors do not indicate that Grewe had any knowledge of the suspicions lodged against Taylor.

After reviewing the record as a whole and drawing all inferences in favor of the non-moving party, we find no support for Taylor's allegations that Grewe was deliberately indifferent to his serious medical needs. Taylor has failed to produce sufficient evidence to create a genuine issue that Grewe deliberately withheld treatment in order to secure a confession about drug use. On the contrary, the evidence suggests that Grewe engaged in a properly conservative course of medical treatment. If generally construed as a claim of negligence against Grewe for failure to diagnose and treat his ruptured appendix, Taylor's claim fails as negligence is not actionable under section 1983. *Estelle*, 429 U.S. at 105-06; *Givens*, 900 F.2d at 1231. Accordingly, we hold that Grewe is entitled to summary judgment on the basis of qualified immunity. *See Mitchell*, 472 U.S. at 526; *Hay*, 931 F.2d at 460.

B. Doerhoff

Appellants maintain that Dr. Doerhoff neither knew nor should have known that his conduct violated Taylor's right to treatment for a serious medical need. Even if Doerhoff were aware that prison officials suspected that Taylor swallowed drug-filled balloons, Taylor produced no evidence to suggest that Doerhoff's surgical and post-operative treatment rose to the level of deliberate indifference. Appellants' Br. at 20-21. Taylor responds that a reasonable jury could conclude that Doerhoff knew or should have known that he continued to experience pain after the surgery due to an abscess. Appellee's Br. at 14-15.

Dr. Doerhoff stated in his deposition that unlike most appendicitis patients, Taylor lacked a high white blood count and a

rigid abdomen. App. 323. Doerhoff initially concluded, before surgery, that Taylor had a small bowel obstruction. *Id.* at 109. After making an incision and discovering pus throughout the abdomen, Doerhoff removed the appendix and inserted drains. *Id.* at 111. He prescribed pain medication and antibiotics. *Id.* at 325, 333. Doerhoff stated that Taylor received the identical care as his patients in private practice and that there was "no delay" in surgery considering Taylor's symptoms, white blood count and temperature. *Id.* at 333.

Doerhoff indicated that the possibility that Taylor had swallowed contraband was properly part of the "differential diagnosis." *Id.* at 334. He stated that "[w]e have patients swallowing lots of things [in the prison], and contraband is very common." *Id.* Nowhere does the record support Taylor's allegation, however, that Doerhoff delayed surgery in order to secure a confession. Nor does deposition testimony, even when viewed in the light most favorable to Taylor, create a genuine issue that Doerhoff intentionally provided defective post-operative treatment. The affidavit of Dr. Glenn A. Barr, upon which the Magistrate Judge relied to recommend against the grant of summary judgment, merely creates an inference of negligence upon the part of all the defendants. *Id.* at 229-32. Accordingly, Taylor has failed to uncover sufficient evidence of deliberate indifference and Doerhoff is entitled to summary judgment upon the basis of qualified immunity. *Mitchell*, 472 U.S. at 526; *Hay*, 931 F.2d at 460.

C. Bowers

Appellants assert that Dr. Bowers neither knew nor should have known that his conduct violated Taylor's right to treatment of a serious medical condition. Although Bowers concedes that he questioned Taylor about ingestion of contraband, he maintains that the only reasonable inference that can be drawn from this evidence is that Bowers attempted to treat a small bowel

obstruction by inserting a nasogastric tube. Appellants' Br. at 25-26. Taylor contends that a reasonable jury could conclude, on the basis of Bower's conduct as a whole, that his treatment rose to the level of deliberate indifference to a serious medical need. Appellee's Br. at 13-14.

Dr. Bowers stated in his deposition that he received information around noon on February 3, 1987 that Taylor might have swallowed a balloon. App. 72. His phone log confirms this contention. *Id.* at 85. Bowers stated that he went to speak with Taylor a few hours later to "try to get him to cooperate with the [nasogastric] tube" and to "tell us truthfully what had happened with the balloon." *Id.* at 77. He indicated to Taylor, "if we knew it was a balloon, that would help us to get to the cause of the problem sooner." *Id.* at 102. On Taylor's MSP hospital progress report, Bowers noted the following:

> P[atien]t denied swallowing anything. In mild to mod[erate] distress [with] hiccups. Abd[ominal] x ray shows gaseous dilation et [sic] air fluid levels. Explained this to p[atien]t as well as why we need to know what has happened et [sic] why he needs to follow instructions. *Explained consequences.*

Id. at 128 (emphasis added).

Bowers denied that he withheld treatment in order to coerce Taylor to admit that he swallowed a drug balloon. *Id.* at 102. Bowers asserted that he would have called a surgeon sooner had Taylor cooperated by keeping the nasogastric tube in place. *Id.* at 88, 98. Bowers also conceded that if he had not believed Taylor's denials, he "might have called a surgeon a little bit sooner." *Id.* at 103.

After reviewing the record as a whole, we conclude that Taylor produced sufficient evidence to create a genuine issue as to whether Bowers intentionally prolonged surgical intervention

in order to prompt the inmate to confess that he swallowed a drug-filled balloon. Bower's conversation with the patient, his deposition testimony, and his notations in the patient's progress report create an issue that Bowers violated clearly established law. Accordingly, Bowers is not entitled to qualified immunity. *Mitchell,* 472 U.S. at 526; *Hay,* 931 F.2d at 460. We affirm the denial of summary judgment with respect to Dr. Bowers only. Our affirmance does not in any way indicate any view, however, of the validity of the prisoner's case against Bowers.

We need not discuss extensively appellants' second claim of error, which related to an alleged eleventh amendment bar to Taylor's state law negligence claims. As we have previously held that Grewe and Doerhoff are entitled to qualified immunity, this issue remains viable only with respect to Bowers. Appellants allege that the eleventh amendment bars Taylor from seeking monetary relief from Bowers because the state is the real party in interest. We believe that the appellants misread the applicable law.[3]

Taylor sued Bowers for damages in his official and individual capacity, alleging violations of the United States Constitution and state law. The eleventh amendment does not prohibit a suit for damages against a state officer in his individual capacity. *DeYoung v. Patten,* 898 F.2d 628, 635 (8th Cir. 1990); *Nix v. Norman,* 879 F.2d 429, 432-33 & n.3 (8th Cir. 1989). Nor does the eleventh amendment shield Bowers from liability in his official capacity for acts which violate the United States Constitution. *Norman,* 879 F.2d at 432 (citing *Ex Parte Young,* 209 U.S. 123 (1908)). Accordingly, no jurisdictional bar precludes us from remanding to the district court.

---

[3] *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 117 (1984) holds that the eleventh amendment proscribes a federal suit against state officials on the basis of state law when the sought-after relief would have a direct impact on the state.

III. CONCLUSION

We reverse the denial of summary judgment on behalf of Doctors Grewe and Doerhoff, who are entitled to qualified immunity. We affirm the denial of summary judgment with respect to Dr. Bowers and remand for trial.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 87-4263-CV-C-5

WESLEY TAYLOR,
Plaintiff,

v.

DR. RICHARD K. BOWERS, D.O., et al.,
Defendants.

ORDER

[Filed: August 8, 1990]

By report of June 21, 1990, the United States Magistrate to whom this cause has been referred recommended the denial of defendants' motion for summary judgment. The parties were advised they could file written exceptions to the recommendation, pursuant to 28 U.S.C. § 636(b)(1)(C).

A *de novo* review of the record in this cause, including the exceptions to the recommendation filed by defendants on July 11, 1990, convinces the court that the recommendation of the Magistrate is correct in all respects and should be adopted.

IT IS, THEREFORE, ORDERED that defendants' motion of September 7, 1989, for summary judgment should be and it is hereby denied.

/s/ Scott O. Wright
SCOTT O. WRIGHT
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 87-4263-CV-C-5

WESLEY TAYLOR,
Plaintiff,

v.

DR. RICHARD K. BOWERS, D.O., et al.,
Defendants.

REPORT, RECOMMENDATION AND ORDER OF THE UNITED STATES MAGISTRATE

[Filed: June 21, 1990]

Plaintiff, an inmate confined in a Missouri penal institution, commenced this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and its corresponding jurisdictional statute, 28 U.S.C. § 1343. Following the filing of this cause, it was referred to the undersigned United States Magistrate for processing in accordance with the Magistrate Act, 28 U.S.C. § 636, and W.D.Mo.R. 22.

On September 7, 1989, defendants Bowers, Grewe and Doerhoff filed a motion for summary judgment on the basis that there was no material disputes of fact and they are entitled to judgment as a matter of law. Plaintiff responded thereto.

Facts

In his second amended complaint, filed after defendants' motion for summary judgment, plaintiff states he reported to the Missouri State Penitentiary Hospital at approximately 1:00 p.m. on February 1, 1987. Plaintiff stated he had repeatedly thrown

up blood and had a severe burning pain in his stomach. Plaintiff was questioned about drug ingestion and examined. He states he was told by defendant Grewe that he appeared to have a bowel obstruction. Plaintiff remained at the hospital and continued to complain of pain and to vomit. Sometime on February 4, 1987, exploratory surgery was performed and thereafter, plaintiff was informed he had been suffering from a ruptured appendix. Following the surgery, plaintiff continued to have recurring stomach pains and vomiting, and on February 16, 1987, was transferred to the University of Missouri — Columbia Hospital and Clinics, where a second surgery was performed to drain an abscess.

Summary Judgment Standard

Fed.R.Civ.P. 56(c) requires "the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The burden on the party moving for summary judgment "is only to demonstrate . . . that the record does not disclose a genuine dispute on a material fact." *City of Mt. Pleasant, Iowa v. Associated Elec. Co-Op.,* 838 F.2d 268, 273 (8th Cir. 1988).

Once the moving party has done so, the burden shifts to the nonmoving party to go beyond his pleadings and show, by affidavit or by "depositions, answers to interrogatories, and admissions on file," that there is a genuine issue of fact to be resolved at trial. *Celotex,* 477 U.S. at 323. Evidence of a disputed factual issue which is merely colorable or not significantly probative, however, will not prevent entry of summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

Summary judgment, however, "is an extreme remedy, to be granted only if no genuine issue exists as to any material fact."

Hass v. Weiner, 765 F.2d 123, 124 (8th Cir. 1985). In ruling on a motion for summary judgment, this court must view all facts in a light most favorable to the nonmoving party, and that party must receive the benefit of all reasonable inferences drawn from the facts. *Robinson v. Monaghan*, 864 F.2d 622, 624 (8th Cir. 1989).

If "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," the court must grant summary judgment. Fed.R.Civ.P. 56(c).

Discussion

In this case, plaintiff asserts defendants were deliberately indifferent to his serious medical needs, committed malpractice, and acted as if plaintiff had swallowed "balloons" which had caused his condition. Defendants state they engaged in adequate and initially conservative treatment of plaintiff's condition and that they are entitled to judgment as a matter of law.

Upon review of the depositions, suggestions, and affidavits on file, it appears there are material facts in dispute. Plaintiff claims certain treatment was withheld in an effort to get him to admit to ingesting balloons. Defendants state they followed a conservative treatment in accordance with acceptable medical practice, and had no improper motive. An affidavit signed by Dr. Glenn A. Barr and submitted by plaintiff states plaintiff was not treated for his pain; was obviously dehydrated and did not receive hydration or provision for maintenance of his nutritional status; there was no identifiable course of medical treatment or diagnostics order; consultation with a surgeon was delayed; and plaintiff's post-operative care was not within minimal standards. Dr. Barr also states defendants' failure to render necessary medical treatment resulted in damage to plaintiff. Under these circumstances, summary judgment is inappropriate.

A review of the record in this cause does not show defendant Ernest Cowles has been served with a copy of the summons and complaint. Fed.R.Civ.P. 4(j) provides for dismissal of parties for whom service of process has not been made within 120 days after the filing of the complaint. Plaintiff's second amended complaint was filed on December 13, 1989. More than 120 days has passed, and defendant Cowles should be dismissed as a party unless plaintiff can show good cause for not obtaining service.

IT IS, THEREFORE, ORDERED that within twenty (20) days hereof, plaintiff show cause in writing why his claims against defendant Cowles should not be dismissed pursuant to Fed.R.Civ.P. 4(j).

For the forestated reasons and pursuant to the provisions of 28 U.S.C. § 636, it is

RECOMMENDED that defendants' motion of September 7, 1989, for summary judgment be denied.

Under 28 U.S.C. 636(b)(1), the parties may make specific written exceptions to any or all of the foregoing recommendations within twenty (20) days of their receipt thereof. If additional time is needed to file exceptions, a motion requesting such time should be filed within said twenty days, giving the reasons for the request. *See Nettles v. Wainwright,* 656 F.2d 986 (5th Cir. 1981); *Messimer v. Lockhart,* 702 F.2d 729 (8th Cir. 1983); *Thomas v. Arn,* 474 U.S. 140 (1985); *Nash v. Black,* 781 F.2d 665 (8th Cir. 1986). The parties are advised that failure to make specific written exceptions to this Report and Recommendation may result in a waiver of their right to appeal.

Dated this 21st day of June, 1990.

/s/ William A. Knox
WILLIAM A. KNOX
United States Magistrate

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2539WMJ

Wesley Taylor,
Appellee,

vs.

Richard K. Bowers, et al.,
Appellants.

Appeal from the United States District Court
for the Western District of Missouri

The suggestion for rehearing en banc is denied.

Appellee's petition for rehearing to the panel is granted in part. The panel opinion is modified as to point 4 raised by appellee Wesley Taylor: "Dismissal of a state law negligence claim on the merits is not appropriate where the Court grants summary judgment on claims under 42 U.S.C. §1983 because state substantive law is controlling on the pendent claim."

Pages 15 and 16 of the original panel opinion filed June 10, 1992 are substituted with the attached pages 15 and 16. All other contentions raised by appellee are rejected.

Judge Loken would deny the appellee's petition for rehearing in its entirety.

July 31, 1992

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

We need not discuss extensively appellants' second claim of error, which relates to an alleged eleventh amendment bar to Taylor's state law negligence claims. Appellants allege that the eleventh amendment bars Taylor from seeking monetary relief from Bowers because the state is the real party in interest. We believe that the appellants misread the applicable law.[3]

Taylor sued Bowers for damages in his official and individual capacity, alleging violations of the United States Constitution and state law. The eleventh amendment does not prohibit a suit for damages against a state officer in his individual capacity. *DeYoung v. Patten*, 898 F.2d 628, 635 (8th Cir. 1990); *Nix v. Norman*, 879 F.2d 429, 432-33 & n.3 (8th Cir. 1989). Nor does the eleventh amendment shield Bowers from liability in his official capacity for acts which violate the United States Constitution. *Norman*, 879 F.2d at 432 (citing *Ex Parte Young*, 209 U.S. 123 (1908)). Accordingly, no jurisdictional bar precludes us from remanding to the district court.

III. CONCLUSION

We reverse the denial of summary judgment on behalf of Doctors Grewe and Doerhoff, who are entitled to qualified immunity on the section 1983 claim. We affirm the denial of summary judgment with respect to Dr. Bowers and remand for trial. We remand the negligence claim against Grewe and Doerhoff to the district court.[4]

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[3] *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 117 (1984) holds that the eleventh amendment proscribes a federal suit against state officials on the basis of state law when the sought-after relief would have a direct impact on the state.

[4] Initially, the complaint alleged section 1983 and negligence claims against all three defendants. The section 1983 and negligence claims remain against Bowers alone. With respect to the negligence claims, we do not address whether defendants Grewe and Doerhoff remain in the lawsuit as

(Footnote 4 continued on next page)

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

(Footnote 4 continued)

pendant parties to the civil rights claim against Bowers. We refer the parties and the district court to the following cases which may be pertinent. *E.g., Finley v. United States*, 490 U.S. 545 (1989); *Sarmiento v. Texas Bd. of Veterinary Medical Examiners*, 939 F.2d 1242, 1248 (5th Cir. 1991); *Ortega v. Schramm*, 922 F.2d 684, 690-93 (11th Cir. 1991); *Stallworth v. City of Cleveland*, 893 F.2d 830, 838 (6th Cir. 1990); *Rodriguez v. Comas*, 888 F.2d 899, 904 (1st Cir. 1989); *see also Lockard v. Missouri Pacific R. Co.*, 894 F.2d 299 (8th Cir. 1990) (pendent party jurisdiction not authorized by FELA).

PUBLISHER'S NOTE:

THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:

Pages iii thru vi

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NO. 92-339

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

DR. RICHARD K. BOWERS,

Petitioner,

vs.

WESLEY TAYLOR,

Respondent.

Brief in Opposition to
Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

William A. Frerking
Morrison & Hecker
2600 Grand
Kansas City, Missouri 64108
(816) 691-2600

Attorneys for Respondent

QUESTIONS PRESENTED

Respondent is satisfied with petitioner's second question, but believes that the first question omits the primary issue before this Court. The first question should read as follows.

1. Did the Eighth Circuit properly affirm the district court's denial of summary judgment to a defendant physician responsible for the medical care of a plaintiff prisoner when the motion was made prior to the close of discovery?

LIST OF PARTIES

Respondent is satisfied with the petitioner's list of parties except that he omits to inform the Court that defendant's Dr. Kent Grewe and Dr. Carl R. Doerhoff were, and remain, parties to this action due to state-law negligence claims within the district court's pendent jurisdiction.

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TABLE OF AUTHORITIES

In addition to the authorities cited by petitioner, respondent also relies on the following:

Anderson v. Liberty Lobby, Inc., 488 U.S. 242, 106 S.Ct. 2505 (1986).

Haas v. Weiner, 765 F.2d 123 (8th Cir. 1985).

Robinson v. Monaghan, 864 F.2d 622 (8th Cir. 1989).

Ramsey v. Ciccone, 310 F.Supp. 600 (D.C.Mo. 1970).

Reynolds v. Swenson, 313 F.Supp. 328 (D.C.Mo. 1970).

Williams v. Vincent, 508 F.2d 541 (2nd Cir. 1974).

Scheuer v. Rhodes,. 416 D.S. 232, 40 L.Ed 2d 90, 94 S.Ct. 1683 (1974).

U.S. Const. amend. XI

OPINIONS AND JUDGMENTS

Respondent is satisfied with petitioner's presentation of the opinions and judgments on page one of the Petition, but adds the two orders of the U.S. Magistrate, which stayed further discovery and proceedings, in its separate Appendix.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1331 and the doctrine of pendent jurisdiction, the respondent brought this suit in the United States District Court, Western District of Missouri. The District Court, upon recommendation of the United States Magistrate and de novo review of the record, denied petitioner's motion for summary judgment based upon qualified immunity (Petitioner's Appendix to Petition for Writ of Certiorari, hereafter "**A**"; A.13 and 14).

On petitioner's appeal, the Court of Appeals for the Eighth Circuit entered a judgment and issued an Opinion dated June 10, 1992, affirming in part and reversing in part the District Court's Order with respect to petitioner (A.1-12). A Petition for Rehearing or Rehearing En Banc was filed by petitioner on June 24, 1992, and was denied on July 31, 1992 (A.18). A Petition for Rehearing was filed by respondent on July 7, 1992 (Respondent's Appendix hereafter "**RA**"; RA.1). The Court of Appeals granted Respondent's Petition for Rehearing in part and modified its opinion on July 31, 1992 (A.18). The petitioner has sought the jurisdiction of this Court to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

The petitioner filed his Petition for Writ of Certiorari on August 24, 1992. Respondent received a copy of the petition September 2, 1992, in an envelope postmarked August 31, 1992. Pursuant to Rule 13 of the Rules of the Supreme Court, respondent shall have 30 days after receipt of a petition to file an opposing brief. Thus, respondent's brief is due October 2, 1992, and pursuant to Rule 29 of the Rules of the Supreme Court, respondent's brief, if mailed first-class, postage prepaid, must bear a postmark showing that the brief was mailed on or before the last day for filing.

STATEMENT OF CASE

Respondent Wesley Taylor was at all relevant times a prisoner in the Missouri State Penitentiary, Jefferson City, Missouri. He brought an action against petitioner, Dr. Richard K. Bowers, and two other doctors, Dr. Kent Grewe and Dr. Carl Doerhoff (collectively, the "**doctors**"), in their official and individual capacities claiming (1) under 42 U.S.C. § 1983 that each was deliberately indifferent to respondent's serious medical needs in denying him needed medical treatment and (2) under Missouri law that each was negligent in his care of respondent. Jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331 and the doctrine of pendent jurisdiction.

The doctors moved for summary judgment prior to the completion of discovery. This district court denied the motion and the court of appeals affirmed in part and reversed in part.

On the morning of February 1, 1987, respondent reported to the Missouri State Penitentiary Hospital ("**hospital**") complaining of "terrible abdominal pain" and that the pain "hurts all over" (Appellant's Separate Appendix filed with the Eighth Circuit, hereafter "**App.**"; App. 235). Dr. Grewe examined him, questioned him about drug ingestion (swallowing balloons or condoms filled with illegal drugs, hereafter referred to as "**balloons**"), and admitted him for observation (App. 192, 235). However, respondent was not seen by another physician for over 34 hours despite respondent exhibiting a serious medical condition causing "terrible" pain. Between the time respondent was admitted to the hospital and his second visit from a physician, the medical record contains: (i) five separate references to respondent vomiting blood, referred to as "emesis," "vomitus" or "coffee ground emesis," often in large or copious amounts (App. 138, 139, 236-238, 375); (ii) six separate references to respondent complaining of pain sometimes described as "terrible" (App. 126, 138, 139); (iii) a reference to him again being questioned about drug ingestion or balloons and his continued denial

(App. 138); and (iv) no reference to his being provided any pain medication, treatment for his hydration or nutrition (App. 126-166, 195-196).

The second doctor to visit respondent, not a party to this action, questioned him regarding alcohol use which respondent denied, and again noted that respondent had vomited blood and was in "distress" (App. 236). That same doctor visited respondent approximately 40 minutes later, noted that additional blood had been vomited and recommended that respondent be transferred to the University of Missouri-Columbia Medical Center "ASAP" (App. 236). The next morning, a nurse reported to petitioner, Dr. Bowers, the chief medical administrator at the hospital and respondent's attending physician (Petition for Writ, hereafter "P"; P.2), that respondent had been vomiting blood and that the doctor last visiting respondent had recommended a transfer ASAP (App. 85, 140, 141). Without visiting respondent or reviewing his medical record, petitioner overruled the recommendation for transfer, although he later stated that overruling a transfer request was not typical and that if he had known that respondent was vomiting coffee ground emesis he would have "okayed the transfer of the patient at that time" (App. 374, 375). However, the hospital medical record contained eight references to respondent's vomiting blood prior to petitioner's decision to overrule the transfer (App. 138-141, 236).

More than 16 hours elapsed between the recommendation for transfer "ASAP" and the next visit from a physician, this time petitioner, at approximately 2:30 p.m., on February 3, 1987 (App. 193). It was respondent's third day in the hospital without pain medication, hydration or nutrition (App. 126-166, 195, 196), although the questioning concerning balloon ingestion continued (App. 140, 141). Petitioner did not examine respondent during his visit (App. 260) nor did he examine respondent's medical record, as evidenced by his statement in his deposition that had he known respondent was vomiting blood, he would have "shipped him out" before February 4 (the day of the surgery) or at least called the surgeon sooner (Addendum to Appellee's Brief filed with the Eighth

Circuit, hereafter "**Add.**"; Add. 2,3). Yet petitioner did question him about this "noncompliance" and swallowing balloons (App. 77), although respondent denied ingesting balloons. Dr. Bowers explained "why we [prison doctors] need to know what happened," and "explain the consequences" (App. 128). Respondent again denied ingesting balloons (App. 128).

No other doctor visited respondent until Dr. Doerhoff performed emergency surgery on him approximately 30 hours later (App. 128). The hospital medical record contains thirteen (13) references to emesis or blood being vomited by respondent in his four-day hospital stay prior to his surgery. Just prior to midnight on February 4, 1987, Dr. Doerhoff performed exploratory surgery due to respondent's deteriorating condition, found a ruptured appendix, and claimed to have removed and properly treated it (App. 193). However, Dr. Doerhoff failed to prescribe any post-operative antibiotics and respondent developed an abscess which caused him to be transferred to the University of Missouri-Columbia Medical Center 12 days later to have a second surgery to drain the abscess (App. 193-194).

As discovery was progressing, the doctors moved for summary judgment on the basis of qualified immunity and Eleventh Amendment bars to the state negligent claims. In his Brief in Opposition to the Motion for Summary Judgment, respondent submitted an affidavit of a medical doctor and surgeon, duly licensed to practice medicine in the State of Missouri, stating, inter alia that the respondent: was never treated for pain; repeatedly vomited and was obviously dehydrated; received no hydration or provision for maintenance of his nutritional status; received no identifiable course of medical treatment and none was ordered or prescribed; received no identifiable course of diagnostics to determine the cause of his acute and serious condition; was at all times in a condition requiring a surgical consult which was not obtained; had a medical condition which worsened yet no medical treatment was received; did not receive even the minimum acceptable standard of medical post-operative care from his first surgery to his second; suffered a burst appendix and subsequent

abscess as the direct and proximate result of the doctors' failure to diagnose and render medical attention which was urgently needed; suffered a potentially life-threatening condition that was ongoing and continuous from his admission to the hospital and that as a result of the failure of the doctors to render necessary medical attention, respondent experienced pain and suffering, was placed at high risk and exhibited a serious medical need that required urgent medical care (App. 229-232).

Petitioner incorrectly states in his Petition for Writ of Certiorari that the doctors' motion for summary judgment came after discovery had been completed (P.2). On September 7, 1989, the doctors filed both for summary judgment and for a stay of further proceedings and discovery pending the outcome of the summary judgment motion (RA.24). On December 13, 1989, the magistrate issued an Order staying discovery pending the outcome of the motion for summary judgment (RA.28). On June 21, 1990, the magistrate filed a Report, Recommendation and Order recommending, among other things, denial of the doctors' motion and the doctors filed Exceptions (A.14). The district court denied the doctors' motion for summary judgment by Order dated August 8, 1990, after review of the magistrate's recommendations, the doctors' exceptions and a de novo review of the record (A.13). The doctors appealed. By Order dated September 17, 1990, the magistrate continued the stay on discovery and proceedings until resolution of the appeal (RA.31).

The Eighth Circuit Court of Appeals reversed the district court's denial of summary judgment as to Dr. Grewe and Dr. Doerhoff, ruling that they were entitled to qualified immunity on the civil rights claim. It affirmed the denial of summary judgment with respect to Dr. Bowers, stating that respondent produced sufficient evidence to create a genuine issue of fact as to whether Dr. Bowers intentionally prolonged surgical intervention in order to prompt the inmate to confess that he swallowed a balloon in violation of clearly established law (A. 10 and 11).

SUMMARY OF ARGUMENTS

I. The Eighth Circuit did not decide an important question of federal law, but merely affirmed that genuine issues of material fact existed after review of the record. Petitioner incorrectly asserts that if any treatment is provided by a physician, there can be no deliberate indifference, but only a difference of opinion regarding the exercise of medical judgment. Petitioner also requests that this Court impose a new standard of proof upon a party trying to rebut a motion for summary judgment.

II. It is within the district court's discretion to exercise pendent jurisdiction over a claim against a state official in his individual capacity seeking damages. There is no precedent which bars such claims by the Eleventh Amendment and there is no conflict among the circuits regarding application of the Eleventh Amendment.

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW, BUT MERELY AFFIRMED THE DENIAL OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT FINDING THAT THERE WERE GENUINE ISSUES OF MATERIAL FACT.

The case before this Court is an appeal from denial of a motion for summary judgment. That motion was made prior to the close of discovery and, at petitioner's request, the district court stayed further discovery. The summary judgment motion was thus premature. The appellate court found after reviewing the record as a whole, that a genuine issue of material fact exists as to the § 1983 claims against Dr. Bowers (A. 10) and as to the state law claims against all the doctors. Petitioner's statement that the Eighth Circuit did not rely on respondent's affidavit from a physician (P.7) is contradicted by the Eighth Circuit's opinion (A.10).

The Federal Rules of Civil Procedure provide that summary judgment be rendered where there is no genuine issue as to any material fact and when the movant is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c). The basic and threshold determination is whether there are

"genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 488 U.S. 242, 250, 106 S.Ct. 2505, 2510-11 (1986). While the non-movant party must produce more than a "scintilla of evidence in its favor," Id. at 2510, "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions." Id. at 2513. Further, summary judgment is "an extreme remedy, to be granted only if no genuine issue exists as to any material fact." Hass v. Weiner, 765 F.2d 123, 124 (8th Cir. 1985). In ruling on a motion for summary judgment, the court must review all facts in the light most favorable to the non-moving party, and that party must receive the benefit of all reasonable inferences drawn from the facts. Robinson v. Monaghan, 864 F.2d 622, 624 (8th Cir. 1989).

A. THERE SHOULD BE NO REQUIREMENT THAT RESPONDENT PROVIDE EXPERT EVIDENCE THAT PETITIONER'S TREATMENT OF RESPONDENT WAS DELIBERATELY INDIFFERENT TO REBUT A MOTION FOR SUMMARY JUDGMENT.

Petitioner requests that this Court create and adopt a hard-line rule concerning the quality and quantity of proof necessary to rebut a motion for summary judgment based on qualified immunity. Petitioner asserts that such a rule should require expert proof that a physician's treatment was such a substantial departure from accepted professional judgment as to be deliberately indifferent. Petitioner states that such a rule is "similar" to the rule in Youngberg v. Romeo, 457 U.S. 307, 323 (1982), but fails to note that Youngberg did not involve a pretrial motion for summary judgment at all, but was simply a post-trial appeal. To adopt such a rule in the present posture of this case would be to substantially redefine the standard for summary judgment. Both the magistrate and the Eighth Circuit found that respondent's affidavit from his physician provided a sufficient basis to raise genuine issues of material fact. Petitioner's request that this Court create and adopt a hard-line rule concerning the quality and quantity of proof is inappropriate and premature, particularly in this case where, contrary to petitioner's statement (P.2.), discovery has not been completed.

B. A PHYSICIAN WHO TREATS A PRISONER IS NOT ENTITLED TO QUALIFIED IMMUNITY IF THAT TREATMENT IS DELIBERATELY INDIFFERENT TO THE PRISONER'S SERIOUS MEDICAL NEEDS.

Petitioner's argument to persuade the Court to grant summary judgment is based on the faulty premise that if a physician provides any treatment, the physician is entitled to qualified immunity. Therefore, petitioner asks the Court to adopt the view that a physician may be deliberately indifferent only if he fails to act. This is a ludicrous proposition and contrary to well-established law. "[R]eckless disregard, callous inattention and gross negligence which result in denial of needed medical treatment is equivalent to intentional denial of medical treatment, and therefore violates the rights guaranteed by the 8th amendment [sic]." Ramsey v. Ciccone, 310 F. Supp. 600, 605 (D.C. Mo. 1970). See also Reynolds v. Swenson, 313 F. Supp. 328, 329 (D.C. Mo. 1970).

A case very similar to the case at bar is Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974). Williams, a prisoner, filed a petition against various prison officials, including the doctors that provided him medical treatment, claiming, among other things, that they were deliberately indifferent to his serious medical needs. Williams had a large portion of his ear cut off in a prison fight. When taken to the prison hospital, he alleged that he requested that the doctors sew it back on. Instead, they told him he did not need his ear, threw it away and sewed up the stump. The court stated, "[a] complaint under section 1983 based on inadequate medical treatment states a cause of action if it alleges conduct which 'shocks the conscience' such as deliberate indifference by prison authorities to a prisoner's request for essential medical treatment [cites omitted]." Id. at 544. In reversing the district court's grant of the state's motion to dismiss, the court rejected the state's arguments that the doctor's treatment was "nothing more than a difference of opinion over a matter of medical judgment" and did not arise to deliberate indifference. The court stated, "[b]ut on the basis of the allegations in the complaint, and assuming that evidence might show that sewing the severed portion of the ear back on was practicable, the possibility that deliberate indifference caused an easier and less

efficacious treatment to be consciously chosen by the doctors cannot be completely foreclosed." Id. at 544.

The court in Williams was not persuaded by the state's argument that if a prisoner is provided medical treatment, any dispute that arises is only a difference of medical judgment and the doctors cannot be found to have been deliberately indifferent. This Court should likewise reject that argument by petitioner.

II. A. THE EIGHTH CIRCUIT PROPERLY DECIDED THAT A PENDENT STATE-LAW NEGLIGENCE CLAIM AGAINST A STATE OFFICIAL IN HIS INDIVIDUAL CAPACITY IS NOT BARRED BY THE ELEVENTH AMENDMENT.

In Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 911 792 L.Ed. 2d 67 (1984), this Court held that the Eleventh Amendment barred claims based on violations of state law and seeking prospective or retroactive injunctive relief against state officials in their official capacity. Petitioner asks the Court to extend that holding and apply it to claims based on violation of state law which seek damages against state officials in their individual capacity. There is no basis for such an extension.

The Eighth Circuit was correct in declining to extend the Pennhurst rationale to this case. First, there should be no interference with public administration since the district court will be applying state law only to the actions of petitioner in his individual capacity, not his official capacity. Second, Mo. Rev. Stat. § 105.711 (1991 Cum. Supp.) does not provide that the legal expense fund is the exclusive source of payment of a claim against a physician employed by the State of Missouri or any agency of the State under contract to provide services to inmates; it merely provides that monies in the State legal expense fund shall be available for such claims. Therefore, it cannot be said that "[a]ny judgment against a Missouri official [petitioner] would be paid from the state treasury" (P.9). If the State chooses to indemnify certain employees or agents, that is the State's prerogative.

However, the State cannot be allowed to use the fact that it chooses to indemnify an employee for acts committed in his individual capacity as a bar of suits against that employee.

B. THERE IS NO CONFLICT AMONG THE CIRCUITS.

Petitioner cites Hughes v. Savell, 902 F.2d 376, 378 (5th Cir. 1990) to support its assertion that the Eighth and Fifth Circuits are in conflict regarding the application of the Eleventh Amendment to state law claims for damages against state officials in their individual capacity. Once again petitioner fails to inform the Court of the significant differences between Hughes and this case, including that Hughes was an appeal of a trial verdict and not a pre-trial summary judgment motion which occurred during discovery.

In Hughes, the Fifth Circuit remanded to the district court with instructions to dismiss for lack of jurisdiction under the Eleventh Amendment. This decision was based on the fact that the state official sued was a prison guard. A unique aspect of the Louisiana law is that it imputes the negligence of prison employees to the state. Any liability of a prison guard in Louisiana in his individual capacity, therefore, will be imputed to the state. The Fifth Circuit cited numerous Louisiana cases supporting that position but failed to find a Louisiana case which held a prison guard individually liable without imputing liability to the state. Therefore, the court concluded, based on Louisiana law, that "[i]n order for Hughes to plead a cause of action for Savell's negligence, Hughes must sue Sgt. Savell as an agent of the state." Id. at 379. The court then applied Pennhurst to bar that claim. No extension of Pennhurst, such as that requested by petitioner, was required as unique state law prevented the prison official from being sued in his individual capacity.

Another distinction between this case and Hughes is that this case alleges negligence against a licensed physician, not a prison guard. Neither the standard of care of a physician licensed to practice in Missouri, nor the ability of an improperly treated patient to recover damages against that physician, should be diminished simply because that physician is paid by the state. Also, the fact that

petitioner is no longer a state official is irrelevant to this action. At all times relevant to the complaint in this matter, petitioner was an employee of the State of Missouri.

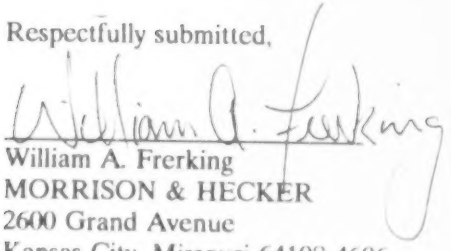
Although petitioner correctly observes that Nix v. Norman, 879 F.2d 429 (8th Cir. 1989), which the Eighth Circuit cited, does not involve an underlying state law claim or a claim against a state official in his individual capacity, he fails to note that a substantial portion of the opinion deals with whether Nix sued the defendants in their individual or official capacities. Such a discussion would be unnecessary if there were no distinction between being sued in one's individual and official capacities. The portions of the Nix opinion cited by the Eighth Circuit clearly state that the Eleventh Amendment does not bar compensatory damage suits against state officials in their individual capacity, and cites Scheuer v. Rhodes, 416 U.S. 232, in support. Scheuer involved complaints filed against various state officials claiming damages under 42 U.S.C. § 1983 and at least one pendent state claim. The district court dismissed the complaints for lack of jurisdiction under the Eleventh Amendment and the Sixth Circuit affirmed. This Court reversed and remanded, holding that dismissal was premature. The Court stated that a public official who violates the Federal Constitution is "stripped of his official or representative character and is subjected in his person [emphasis is the Court's] to the consequences of his individual conduct" and that money damages against such individual defendants are permissible "notwithstanding the fact that they hold public office." Id. at 237-238.

Petitioner has not shown that any conflicts among the circuits exist as to either the interpretation of the Eleventh Amendment's bar or the ability of federal courts to exercise their pendent jurisdiction in cases such as this.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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RESPONDENT'S APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2539WMJ

WESLEY TAYLOR,
Appellee,

v.

DR. RICHARD K. BOWERS, D.O., et al.,
Appellants.

Appeal from the United States District Court,
Western District of Missouri, Central Division,
The Honorable Scott O. Wright, Judge

APPELLEE'S PETITION FOR REHEARING

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PETITION FOR REHEARING

Appellee Wesley Taylor moves this Court, pursuant to Rule 40 of the Federal Rules of Appellate Procedure and Rule 40A of the 8th Circuit Rules of Appellate Procedure to set aside its opinion of June 10, 1992, (attached hereto), and grant a rehearing because this Court overlooked or misapprehended points of law and or fact. The points of law and/or fact this Court has overlooked or misapprehended are as follows:

1. The applicable standard for finding that a person has been unconstitutionally denied medical treatment is deliberate indifference to a serious medical need, not intentional conduct.

2. The affidavit of Dr. Glenn A. Barr creates more than an inference of negligence upon the part of the appellants.

3. Dismissal of a state law negligence claim is not automatic because the trial court can exercise its pendent jurisdiction.

4. Dismissal of a state law negligence claim on the merits is not appropriate where the Court grants summary judgment on claims under 42 U.S.C. § 1983 because state substantive law is controlling on the pendent claim.

SUGGESTIONS IN SUPPORT OF PETITION FOR REHEARING

The applicable standard for finding that a person has been unconstitutionally denied medical treatment is deliberate indifference to a serious medical need. Estelle v. Gamble, 97 S. Ct. 285, 429 U.S. 97, 104, 50 L.E.2d 251 (1976). Deliberate indifference is defined as "unnecessary and wanton infliction of

pain." Estelle at 104. However, in regard to Dr. Doerhoff, this Court stated that the evidence did not "create a genuine issue that Doerhoff intentionally (emphasis added) provided defective post-operative treatment," (Op. 12) and that appellee had therefore "failed to uncover sufficient evidence of deliberate indifference." (Op. 12). The elements required to prove deliberate indifference to a serious medical need do not include proof of intentional conduct. As stated in Plaintiff's (Appellee's) Brief submitted to the Court, deliberate indifference, as used in the context of Plaintiff's action, means conduct characterized by "obduracy and wantonness," Whitley v. Alvers, 475 U.S. 312, 319, 106 S. Ct. 1078, 89 L.Ed.2d 251 (1986), or the "unnecessary and wanton infliction of pain." Estelle at 104. Black's Law Dictionary defines wantonness as "the conscious doing of some act or the omission of some duty with knowledge of existing conditions and consciousness that, from the act or omission, injury will likely result to another." Wanton conduct includes such things as the refusal to treat, ignoring complaints or providing intentionally incorrect treatment. Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985).

A plaintiff can prove deliberate indifference to a serious medical need by showing intentional conduct or omission. However, "reckless disregard, callous inattention and gross negligence which results in denial of needed medical treatment is equivalent to intentional denial of medical treatment, and therefore violates the rights guaranteed by the 8th amendment [sic]." Ramsey v. Ciccone, 310 F. Supp. 600, 605 (D.C. Mo. 1970). In another case, that same

court later stated that the plaintiff had not shown intentional, reckless or callous denial of necessary medical treatment sufficient to prove a constitutional violation. Reynolds v. Swenson, 313 F. Supp. 328, 329 (D.C. Mo. 1970).

Therefore, since recklessness, callous inattention or gross negligence can support a claim of deliberate indifference to a serious medical need, this Court has misapprehended the law. Further, because the record is sufficient to support the claim that Doerhoff was grossly negligent, reckless or callously inattentive to Plaintiff's serious medical needs by providing defective post-operative care, Doerhoff is not entitled to summary judgment.

This Court also held that the affidavit of Dr.Glenn A. Barr "merely creates an inference of negligence." (Op. 12). That affidavit, however, clearly states that between February 5 and 16 appellee did not receive even the minimal acceptable standard of medical post-operative care, as appellee was not seen or examined on a daily basis by any physician even though the severity and seriousness of appellee's condition continued. (App. 229-232). Other than Doerhoff's own statements, the appellants offer no evidence to challenge that opinion, nor do they allege that the standard of care for prison treatment differs from medical care in the private sector. Viewing the evidence in the light most favorable to the non-moving party, Johnson v. Hay, 931 F.2d 456, 460 (8th Cir. 1991), the appellee has uncovered sufficient evidence to create a genuine issue of material fact and Doerhoff is not entitled to summary judgment.

Appellants argue they are entitled to summary judgment on appellee's 42 U.S.C. § 1983 claims (Count I) on the basis of qualified immunity, and that they are entitled to dismissal of appellee's state law negligence claims (Count II) because of the 11th Amendment bar. This Court properly rejected the 11th Amendment argument, but appears nevertheless to have granted Grewe and Doerhoff a dismissal as to Count II, either for lack of pendent jurisdiction or on the merits (Op. 15 and 16), neither of which is an appropriate basis for dismissal of the state law claims.

First, dismissal in this case of the state law negligence claims against Grewe and Doerhoff is not automatic simply because Grewe and Doerhoff were granted summary judgment on the Section 1983 claims. The district court has power to exercise its pendent jurisdiction because Count I discloses a substantial federal claim and the state law negligence claims against Grewe and Doerhoff "derive from a common nucleus of operative fact" and a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." United Mine Workers v. Gibbs, 86 S. Ct. 1130, 1138, 383 U.S. 715, 725, 16 L.Ed.2d 218 (1966). Even if the federal claim had been dismissed as to all the defendants, the district court has discretion to exercise its pendent jurisdiction. Springfield Television, Inc. v. City of Springfield, Mo., 462 F.2d 21, 23-24 (8th Cir. 1972). In this case the district court should exercise its power to hear the pendent claims because otherwise those claims

would be barred by the statute of limitations.[1] O'Brien v. Continental Illinois National Bank & Trust, 593 F.2d 54, 65 (7th Cir. 1979) (pendent jurisdiction should be exercised where statute of limitations has run on pendent claim).

Second, this Court misapprehended the law if its dismissal of Count II was on the merits because state substantive law is controlling on the pendent claim. United Mine Workers v. Gibbs, 86 S. Ct. 1130, 1139, 383 U.S. 715, 726, 16 L.Ed. 2d 218 (1966). For the foregoing reasons, Grewe and Doerhoff are not entitled to dismissal as to Count II.

CONCLUSION

For all the foregoing reasons, the opinion of June 10, 1992, should be set aside and a rehearing should be granted.

Respectfully submitted,

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[1]Section 516.105, Mo. Rev. Stat. 1986, provides in pertinent part that "All actions against physicians . . . for damages for malpractice, negligence, error or mistake . . . must be brought within two years from the date of occurrence of the act of neglect complained of . . . " which in this case was February, 1987.

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the above were served by Federal Express this 6th day of July, 1992, to:

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-2539

Wesley Taylor,	*	
	*	
Appellee,	*	Appeal from the United States
	*	District Court for the Western
v.	*	District of Missouri.
	*	
Richard K. Bowers; Carl Doerhoff; Kent Grewe,	*	
	*	
Appellants.	*	
	*	
Maryland Butts; Helen Farr; Loren Stout.	*	

Submitted: February 12, 1992

Filed: June 10, 1992

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and LOKEN, Circuit Judge.

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BRIGHT, Senior Circuit Judge.

I. INTRODUCTION

Appellants Richard K. Bowers, D.O., Kent Grewe, M.D., and Carl R. Doerhoff, M.D., each of whom is sued individually and in his official capacity as an employee of the Missouri Department of Corrections and Human Resources, appeal from the district court's denial of their motion for summary judgment on appellee Wesley Taylor's claims under 42 U.S.C. § 1983 (1988). On appeal, they allege: (1) they are entitled to summary judgment on the basis of

qualified immunity and (2) the eleventh amendment bars Taylor's state law malpractice claims. We conclude that summary judgment is appropriate for Grewe and Doerhoff, who are entitled to qualified immunity, but not for Bowers. Accordingly, we affirm in part and reverse in part.

II. BACKGROUND

Wesley Taylor is an inmate at the Missouri State Penitentiary [MSP] in Jefferson City, Missouri. He alleges that in the early morning of February 1, 1987, he experienced stomach pains and vomited blood. Taylor reported to the MSP hospital at approximately 1:00 p.m., where he was examined by Dr. Kent Grewe. Taylor alleges that he told Grewe that he had repeatedly thrown up blood and experienced a severe burning pain in his stomach. Taylor also alleges that Grewe questioned him about drug ingestion, which Taylor denied.

After an examination, Grewe concluded that Taylor had a small bowel obstruction. Grewe admitted Taylor to the MSP hospital for observation. Taylor alleges that he continued to experience severe pain and vomit blood. In the evening of February 2, Taylor alleges, a (non-defendant) doctor recommended the transfer of Taylor to the University of Missouri-Columbia Medical Center "ASAP." This transfer failed to materialize until two weeks later.

Taylor alleges that on February 2 or 3, nurse Karen Zumwalt told him that Doctors Grewe and Bowers suspected that he had swallowed drug-filled balloons. Zumwalt also indicated, according to Taylor, that nothing would be done for him until he confessed to swallowing the balloons. Taylor denied the accusations.

Taylor alleges that he continued to experience great pain and vomit repeatedly. On February 4, after allegedly being subjected to repeated questioning by nurses and doctors about the drug-laden balloons, Dr. Doerhoff performed exploratory surgery. Doerhoff found that Taylor's appendix had ruptured. Doerhoff removed the appendix and treated Taylor.

Taylor alleges that he continued to experience stomach pains and vomiting after the surgery. He was transferred to the University of Missouri-Columbia Hospital on February 16. Doctors performed a second surgery to drain an abscess. Taylor alleges that Doerhoff's improper treatment necessitated the second surgery.[1]

Taylor sued Grewe, Doerhoff and Bowers under 42 U.S.C. § 1983, 42 U.S.C. § 1985, and state negligence law. In his section 1983 claim, set forth in count I, he alleged that the defendants had

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[1]The preceding overview represents a summary of the factual allegations before the district court at the summary judgment phase. We will elaborate upon the facts established by the record as necessary to dispose of Taylor's arguments on appeal.

been deliberately indifferent to his serious medical needs. In his section 1985 claim (count II), he alleged that the defendants conspired to deprive him of urgently needed medical treatment in violation of his rights under the fourteenth amendment and section 1983. Count III set forth the bases for Taylor's negligence claims against Grewe, Bowers and Doerhoff.

The defendants moved for summary judgment on counts I and II, raising the defense of qualified immunity. They also moved to dismiss the negligence count for lack of jurisdiction. After reviewing the depositions, suggestions and affidavits submitted by the parties, the Magistrate Judge concluded that a dispute over material facts precluded the entry of summary judgment. Specifically, the Magistrate Judge relied upon the affidavit of Dr. Glenn A. Barr, which stated that Taylor did not receive necessary medical care. Barr also stated that the deficiency of the pre- and post-operative care damaged Taylor.[2] App. 464-65. After de novo review of the record, the district court denied the defendants' summary judgment motion. App. 471. This appeal followed.

[2]Counsel for Taylor conceded at oral argument that Barr is not qualified as an expert in prison treatment.

III. DISCUSSION

As a preliminary matter, we note that we have jurisdiction to hear this appeal even though the district court has not yet rendered a final judgment. To the extent that a district court's denial of a claim of qualified immunity turns upon an issue of law, the denial is an appealable final decision within the meaning of 28 U.S.C. § 1291 (1988), notwithstanding the absence of a final judgment. Johnson v. Hay, 931 F.2d 456, 459 (8th Cir. 1991) [Hay] (citing Mitchell v. Forsyth, 472 U.S. 511, 530 (1985)); Givens v. Jones, 900 F.2d 1229, 1231 (8th Cir. 1990) (citing 472 U.S. at 530). Even when an appeal from the denial of summary judgment implicates fact-based issues, we have held that we have jurisdiction when the record fails to establish a triable issue of fact and can be decided as a matter of law, Hay, 931 F.2d at 460 (citing Wright v. South Arkansas Regional Health Ctr., Inc., 800 F.2d 199, 203 (8th Cir. 1986)) or when the appeal presents the largely legal question of whether an official's acts violate clearly established law of which a reasonable person would have known. Id. We thus have jurisdiction over the instant appeal.

The case law that governs whether the defendants are entitled to a qualified immunity defense is well established. See, e.g., Givens, 900 F.2d at 1231. Government officials are shielded from liability under section 1983 for the performance of discretionary functions "insofar as their conduct does not violate clearly

established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (citations and footnote omitted). "Clearly established" law, the Supreme Court has explained, means "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987).

The burden on the section 1983 plaintiff at the summary judgment phase is also well defined. When the plaintiff fails to allege a violation of clearly established law, "a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." Mitchell, 472 U.S. at 526 (citing Harlow, 457 U.S. at 818). Even when the plaintiff competently alleges the commission of acts that violate clearly established law, "the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." Id.; see also Hay, 931 F.2d at 460 (defendant entitled to summary judgment if discovery failed to uncover sufficient evidence to create a genuine issue as to whether his conduct violated clearly established law); Johnson v. Boreani, 946 F.2d 67, 70 (8th Cir. 1991) [Boreani] (same).

We review the district court's denial of summary judgment de novo, applying the same standard the district court invoked to

decide the motion. Hay, 931 F.2d at 460. Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of the non-moving party. Hay, 931 F.2d at 460 (citation omitted).

Taylor seeks to recover via section 1983 under the eighth amendment, which prohibits cruel and unusual punishment. Cruel and unusual punishment constitutes the "'unnecessary and wanton infliction of pain.'" Estelle v. Gamble, 429 U.S. 97, 104 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion)). In order to demonstrate an eighth amendment violation upon the basis of inadequate medical care, a prisoner must allege acts or omissions that reveal "deliberate indifference to serious medical needs." Estelle, 429 U.S. at 104, 106. A physician's mere negligent failure to diagnose or treat a condition fails to state a valid claim of mistreatment under the eighth amendment. E.g., id. at 105-06; Givens, 900 F.2d at 1231.

Taylor essentially alleges that the defendants withheld medical treatment in order to coerce him into confessing that he ingested drug-filled balloons. At the time in question, February 1987, the law in this circuit was "clearly established" within the meaning of Harlow. 457 U.S. at 818. This court had repeatedly

held that a prisoner's mere difference of opinion over matters of expert medical judgment or a course of medical treatment failed to rise to the level of a constitutional violation. E.g., Randall v. Wyrick, 642 F.2d 304, 308 (8th Cir. 1981) (citations omitted); Martin v. Sargent, 780 F.2d 1334, 1339 (8th Cir. 1985) (citation omitted). Nor was an alleged delay in the receipt of medical treatment sufficient to state a claim of deliberate indifference in and of itself. Compare Fields v. Gander, 734 F.2d 1313, 1315 (8th Cir. 1984) (county sheriff allegedly delayed prisoner's access to dental care for three weeks to compel payment of bill for earlier dental services) with Mills v. Smith, 656 F.2d 337, 340 (8th Cir. 1981) (record failed to support prisoner's allegations that officials said he could go to the hospital only after he made a statement favorable to the police officer who accidentally shot him). An allegation of deliberate indifference to an inmate's need for surgery, however, was sufficient to state a section 1983 claim. See, e.g., Toombs v. Bell, 798 F.2d 297, 298 (8th Cir. 1986) (prison nurse and doctor allegedly ignored inmate request for treatment of gallstones, making surgery to remove gallbladder necessary) (citations omitted); Johnson v. Clinton, 763 F.2d 326, 328 (8th Cir. 1985) (warden allegedly refused to approve necessary hernia operation and assigned inmate to excess work detail); Cotton v. Hutto, 540 F.2d 412, 415 (8th Cir. 1976) (prison official allegedly refused to grant request for hernia operation). Thus, a reasonable prison official in February 1987 would have understood that deliberate indifference to an inmate's need for surgery for

a ruptured appendix violated clearly established eighth amendment law.

Taylor's basic allegation would be sufficient, we believe, to state a violation of clearly established eighth amendment law. If Grewe, Doerhoff and Bowers are to succeed with their defense of qualified immunity, therefore, it must be for the second reason set forth in Mitchell: Taylor's failure to uncover sufficient evidence to create a genuine issue as to whether the defendants committed the allegedly unlawful acts. 472 U.S. at 526. As for Grewe and Doerhoff, we conclude that this is the case.

A. Grewe

The appellants contend that Dr. Grewe neither knew nor should have known that his conduct on February 1, 1987 violated Taylor's constitutional right to treatment of a serious medical condition. Appellants' Br. at 16. Nor does the evidence support an inference that Grewe withheld treatment in order to coerce a confession about drug-filled balloons. Id. at 17. Taylor asserts that the evidence permits an inference that (1) Grewe knew or should have known that Taylor was admitted with pain and nausea; (2) Taylor was dehydrated and vomiting blood; (3) Taylor's serious condition required an immediate surgical consult; and (4) Taylor was under suspicion for swallowing contraband. Appellee's Br. at 13.

In his deposition, Grewe stated that Taylor "exhibited a generalized fairly nonspecific-type of abdominal pain." App. 59. Grewe found that Taylor had no "rebound tenderness," a common symptom of an inflamed appendix. Id. at 62, 64-65. Taylor had a normal white blood count, a normal bowel movement and no nausea or vomiting. Id. at 69.

After completing a physical examination and reviewing lab results and x-rays, Grewe concluded that Taylor suffered from abdominal pain of unknown etiology. Id. at 61. He decided to err "on the conservative side" and had Taylor admitted to the hospital for observation. Id. at 60-61, 66. Neither Taylor nor anyone else told Grewe that the inmate had vomited blood. Id. at 69. Nor do Grewe's clinical notes from the February 1 examination make any mention of contraband or vomiting blood. Id. at 128. The nurses who knew about the balloon rumors do not indicate that Grewe had any knowledge of the suspicions lodged against Taylor.

After reviewing the record as a whole and drawing all inferences in favor of the non-moving party, we find no support for Taylor's allegations that Grewe was deliberately indifferent to his serious medical needs. Taylor has failed to produce sufficient evidence to create a genuine issue that Grewe deliberately withheld treatment in order to secure a confession about drug use. On the contrary, the evidence suggests that Grewe engaged in a properly conservative course of medical treatment. If generally construed

as a claim of negligence against Grewe for failure to diagnose and treat his ruptured appendix, Taylor's claim fails as negligence is not actionable under section 1983. Estelle, 429 U.S. at 105-06; Givens, 900 F.2d at 1231. Accordingly, we hold that Grewe is entitled to summary judgment on the basis of qualified immunity. See Mitchell, 472 U.S. at 526; Hay, 931 F.2d at 460.

B. Doerhoff

Appellants maintain that Dr. Doerhoff neither knew nor should have known that his conduct violated Taylor's right to treatment for a serious medical need. Even if Doerhoff were aware that prison officials suspected that Taylor swallowed drug-filled balloons, Taylor produced no evidence to suggest that Doerhoff's surgical and post-operative treatment rose to the level of deliberate indifference. Appellants' Br. at 20-21. Taylor responds that a reasonable jury could conclude that Doerhoff knew or should have known that he continued to experience pain after the surgery due to an abscess. Appellee's Br. at 14-15.

Dr. Doerhoff stated in his deposition that unlike most appendicitis patients, Taylor lacked a high white blood count and a rigid abdomen. App. 323. Doerhoff initially concluded, before surgery, that Taylor had a small bowel obstruction. Id. at 109. After making an incision and discovering pus throughout the abdomen, Doerhoff removed the appendix and inserted drains. Id.

at 111. He prescribed pain medication and antibiotics. Id. at 325, 333. Doerhoff stated that Taylor received the identical care as his patients in private practice and that there was "no delay" in surgery considering Taylor's symptoms, white blood count and temperature. Id. at 333.

Doerhoff indicated that the possibility that Taylor had swallowed contraband was properly part of the "differential diagnosis." Id. at 334. He stated that "[w]e have patients swallowing lots of things [in the prison], and contraband is very common." Id. Nowhere does the record support Taylor's allegation, however, that Doerhoff delayed surgery in order to secure a confession. Nor does deposition testimony, even when viewed in the light most favorable to Taylor, create a genuine issue that Doerhoff intentionally provided defective post-operative treatment. The affidavit of Dr. Glenn A. Barr, upon which the Magistrate Judge relied to recommend against the grant of summary judgment, merely creates an inference of negligence upon the part of all the defendants. Id. at 229-32. Accordingly, Taylor has failed to uncover sufficient evidence of deliberate indifference and Doerhoff is entitled to summary judgment upon the basis of qualified immunity. Mitchell, 472 U.S. at 526; Hay, 931 F.2d at 460.

C. Bowers

Appellants assert that Dr. Bowers neither knew nor should have known that his conduct violated Taylor's right to treatment of a serious medical condition. Although Bowers concedes that he questioned Taylor about ingestion of contraband, he maintains that the only reasonable inference that can be drawn from this evidence is that Bowers attempted to treat a small bowel obstruction by inserting a nasogastric tube. Appellants' Br. at 25-26. Taylor contends that a reasonable jury could conclude, on the basis of Bowers's conduct as a whole, that his treatment rose to the level of deliberate indifference to a serious medical need. Appellee's Br. at 13-14.

Dr. Bowers stated in his deposition that he received information around noon on February 3, 1987 that Taylor might have swallowed a balloon. App. 72. His phone log confirms this contention. Id. at 85. Bowers stated that he went to speak with Taylor a few hours later to "try to get him to cooperate with the [nasogastric] tube" and to "tell us truthfully what had happened with the balloon." Id. at 77. He indicated to Taylor, "if we knew it was a balloon, that would help us to get to the cause of the problem sooner." Id. at 102. On Taylor's MSP hospital progress report, Bowers noted the following:

> P[atien]t denies swallowing anything. In mild to mod[erate] distress [with] hiccups. Abd[ominal] x ray

> shows gaseous dilation et [sic] air fluid levels. Explained this to p[atien]t as well as why we need to know what has happened et [sic] why he needs to follow instructions. Explained consequences.

Id. at 128 (emphasis added).

Bowers denied that he withheld treatment in order to coerce Taylor to admit that he swallowed a drug balloon. Id. at 102. Bowers asserted that he would have called a surgeon sooner had Taylor cooperated by keeping the nasogastric tube in place. Id. at 88, 98. Bowers also conceded that if he had not believed Taylor's denials, he "might have called a surgeon a little bit sooner." Id. at 103.

After reviewing the record as a whole, we conclude that Taylor produced sufficient evidence to create a genuine issue as to whether Bowers intentionally prolonged surgical intervention in order to prompt the inmate to confess that he swallowed a drug-filled balloon. Bowers's conversation with the patient, his deposition testimony, and his notations in the patient's progress report create an issue that Bowers violated clearly established law. Accordingly, Bowers is not entitled to qualified immunity. Mitchell, 472 U.S. at 526; Hay, 931 F.2d at 460. We affirm the denial of summary judgment with respect to Dr. Bowers only. Our affirmance does not in any way indicate any view, however, of the validity of the prisoner's case against Bowers.

We need not discuss extensively appellants' second claim of error, which relates to an alleged eleventh amendment bar to Taylor's state law negligence claims. As we have previously held that Grewe and Doerhoff are entitled to qualified immunity, this issue remains viable only with respect to Bowers. Appellants allege that the eleventh amendment bars Taylor from seeking monetary relief from Bowers because the state is the real party in interest. We believe that the appellants misread the applicable law.[3]

Taylor sued Bowers for damages in his official and individual capacity, alleging violations of the United States Constitution and state law. The eleventh amendment does not prohibit a suit for damages against a state officer in his individual capacity. De Young v. Patten, 898 F.2d 628, 635 (8th Cir. 1990); Nix v. Norman, 879 F.2d 429, 432-33 & n.3 (8th Cir. 1989). Nor does the eleventh amendment shield Bowers from liability in his official capacity for acts which violate the United States Constitution. Norman, 879 F.2d at 432 (citing Ex Parte Young, 209 U.S. 123 (1908)). Accordingly, no jurisdictional bar precludes us from remanding to the district court.

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[3]Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 117 (1984) holds that the eleventh amendment proscribes a federal suit against state officials on the basis of state law when the sought-after relief would have a direct impact on the state.

III. CONCLUSION

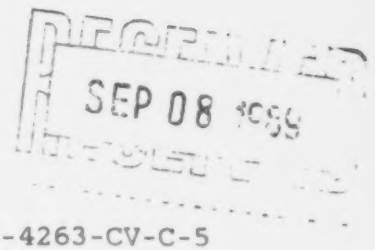
We reverse the denial of summary judgment on behalf of Doctors Grewe and Doerhoff, who are entitled to qualified immunity. We affirm the denial of summary judgment with respect to Dr. Bowers and remand for trial.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION



WESLEY TAYLOR, Plaintiff,	)	
v.	)	No. 87-4263-CV-C-5
DR. RICHARD K. BOWERS, D.O., et al., Defendants.	)	

DEFENDANTS' MOTION FOR STAY OF FURTHER PROCEEDINGS AND DISCOVERY PENDING RESOLUTION OF SUMMARY JUDGMENT MOTION

Come now defendants and move this Court to enter a stay of further proceedings, including discovery, pending resolution of two separate dispositive motions currently filed with this Court. In support of this motion, the defendants state as follows:

1. There has been substantial discovery by both plaintiff and defendants prior to a filing of a summary judgment motion on behalf of defendants Bowers, Grewe, and Doerhoff, and a separate motion to dismiss on behalf of the State of Missouri and the Department of Corrections and Human Resources. Each named defendant has been deposed at length. Defendants have answered over two hundred interrogatory questions and produced all of plaintiff's medical records. Defendants have also agreed to search for and produce additional records and will soon be responding to additional interrogatory questions promulgated to defendant Doerhoff. The plaintiff has answered three sets of interrogatories submitted by defendants.

2. Defendants' motion for summary judgment is exhaustive and should resolve every federal issue in this action. Among the issues raised by defendants are qualified immunity and immunity pursuant to the Eleventh Amendment.

3. In the event any substantive federal issue is not resolved by this Court's order, and if immunity is denied, defendants fully expect to see an interlocutory appeal to the United States Court of Appeals for the Eighth Circuit.

4. Any remaining discovery to be done prior to the trial of this action will be very expensive to the parties and will not be necessary to resolve any of the federal issues raised by defendants' summary judgment motion. If any issue remains to be tried after the Court rules on defendants' motion, discovery should be completed in a few weeks.

5. Defendants can conceive of no sound reason for the parties to continue to exhaust further time and money in continuing to prepare for a trial which will not take place. This is especially true given the absence of any claim for economic or future damages by the plaintiff.

Wherefore, defendants respectfully request that this Court enter its order staying further proceedings in this action until such time as the Court enters its order regarding the motion for summary judgment filed on behalf of defendants Bowers, Grewe, and Doerhoff and the motion to dismiss filed by the State of Missouri and the Department of Corrections and Human Resources.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General

JERRY L. SHORT
Assistant Attorney General
Missouri Bar No. 26318

6th Floor, Broadway Building
Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-3321

ATTORNEYS FOR DEFENDANTS

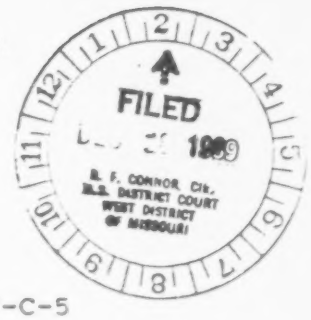
Certificate of Service

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 7th day of September, 1989, to:

William A. Frerking
Linde Thomson Langworthy Kohn & Van Dyke
Post Office Box 26010
Kansas City, Missouri 64196-6010

Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION



WESLEY TAYLOR,)
)
Plaintiff,)
)
v.) No. 87-4263-CV-C-5
)
DR. RICHARD K. BOWERS, D.O., et al.,)
)
Defendants.)

REPORT, RECOMMENDATION AND ORDER OF THE UNITED STATES MAGISTRATE

Plaintiff, an inmate confined in a Missouri penal institution, commenced this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and its corresponding jurisdictional statute, 28 U.S.C. § 1343. Following the filing of this cause, it was referred to the undersigned United States Magistrate for processing in accordance with the Magistrate Act, 28 U.S.C. § 636, and W.D.Mo.R. 22.

By motion filed September 18, 1989, plaintiff seeks leave to file an amended complaint. Defendants have filed no objections within the time allotted by W.D.Mo.R. 13. Fed.R.Civ.P.15(a) provides that leave to amend shall be freely given when justice so requires. Here, it is apparent that plaintiff seeks to clarify the issues for trial and give defendants clear and precise notice of the cause of action being asserted against them.

It is noted that plaintiff's second amended complaint does not include the Missouri Department of Corrections and Human Resources or the State of Missouri as defendants in this cause. Thus,

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defendants' motion of August 28, 1989, to dismiss plaintiff's claims will be recommended denied as moot as to said defendants.

By motion filed September 7, 1989, defendants seek a stay of further proceedings and discovery in this case pending resolution of the motion for summary judgment. By order of September 13, 1989, discovery was extended. Thus, defendants' motion for a stay was implicitly denied insofar as the amended discovery schedule was approved and entered.

By motion of September 29, 1989, plaintiff seeks additional time to take depositions and file a response to defendants' motion for summary judgment prior to the court's ruling thereon. Pursuant to the notice of depositions filed on October 5, 1989, said depositions should now be completed.

IT IS, THEREFORE, ORDERED that plaintiff's motion of September 29, 1989, is denied as moot insofar as it relates to depositions and granted insofar as plaintiff requests additional time to respond to the motion for summary judgment. It is further

ORDERED that within twenty (20) days hereof, plaintiff file his response to defendants' motion for summary judgment. It is further

ORDERED that discovery in this case is stayed pending a ruling on defendants' motion for summary judgment. It is further

ORDERED that defendants' motion of September 7, 1989, for a stay of further proceedings and discovery pending resolution of the motion for summary judgment is hereby denied insofar as said motion

relates to matters set forth in the amended discovery schedule entered on September 13, 1989. It is further

ORDERED that plaintiff is hereby granted leave to file an amended complaint. It is further

ORDERED that defendants file a response thereto pursuant to the provisions of Fed.R.Civ.P.12. It is further

ORDERED that defendant Missouri Department of Corrections and Human Resources' motion of September 7, 1989, for a protective order is hereby denied as moot.

For the forestated reasons and pursuant to the provisions of 28 U.S.C. § 636, it is

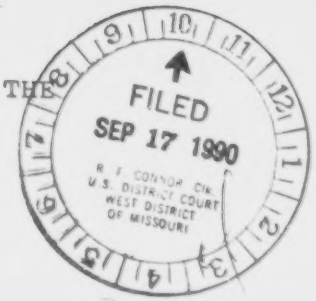
RECOMMENDED that defendants' motion of August 28, 1989, to dismiss the claims against the State of Missouri and the Missouri Department of Corrections and Human Resources be denied as moot.

Under 28 U.S.C. § 636(b)(1), the parties may make specific written exceptions to any or all of the foregoing recommendations within twenty (20) days of their receipt thereof. If additional time is needed to file exceptions, a motion requesting such time should be filed within said twenty days, giving the reasons for the request. See Nettles v. Wainwright, 656 F.2d 986 (5th Cir. 1981); Messimer v. Lockhart, 702 F.2d 729 (8th Cir. 1983); Thomas v. Arn, _____ U.S. _____, 106 S.Ct. 466, 475 (1985); Nash v. Black, 781 F.2d 665 (8th Cir. 1986). The parties are advised that failure to make specific written exceptions to this Report and Recommendation may result in a waiver of their right to appeal.

Dated this 13th day of December, 1989.

William A. Knox

WILLIAM A. KNOX
United States Magistrate



IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

WESLEY TAYLOR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 87-4263-CV-C-5
	)	
DR. RICHARD K. BOWERS, D.O., et al.,	)	
	)	
	)	
Defendants.	)	

ORDER

On September 4, 1990, defendants filed a notice of appeal of the court's order denying defendants' motion for summary judgment on the basis of qualified immunity. Thus, jurisdiction for certain issues in this case rests with the United States Court of Appeals for the Eighth Circuit. To avoid piecemeal resolution, further proceedings will be stayed pending a mandate issued by the Eighth Circuit.

IT IS, THEREFORE, ORDERED that further proceedings in the above-styled cause are stayed pending resolution of the issues on appeal.

Dated this 17th day of September, 1990.

WILLIAM A. KNOX
United States Magistrate

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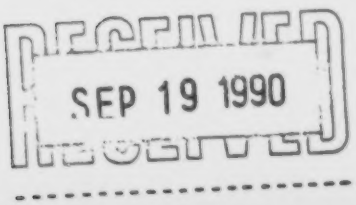

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October 2, 1992

Mr. Joseph F. Spaniol, Jr., Clerk
United States Supreme Court
1 First Street, N.E.
Washington, DC 20543

Re: **Dr. Richard K. Bowers, Petitioner, v. Wesley Taylor, Respondent**
Case No. 92-339

Dear Mr. Spaniol:

We enclose 12 copies of respondent Wesley Taylor's Brief in Opposition to Appellant's Petition for Writ of Certiorari. Included therein is our Motion for Leave to Appeal in Forma Pauperis. An unexecuted copy of the Affidavit of Respondent is included. It has been forwarded to respondent, who will send it to you after it is executed. Also, included separately is our Certificate of Service. My Application for Admission to the Supreme Court has been submitted and is pending.

If you have any questions or comments, please contact the undersigned.

Very truly yours,

MORRISON & HECKER

William A. Frerking

William A. Frerking

WAF/els

Enclosures

cc: Mr. Wesley Taylor

WXF092.KCM/els

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NO. 92-339

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

DR. RICHARD K. BOWERS,

Petitioner,

vs.

WESLEY TAYLOR,

Respondent.

Brief in Opposition to
Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

CERTIFICATE OF SERVICE

William A. Frerking
Morrison & Hecker
2600 Grand
Kansas City, Missouri 64108
(816) 691-2600

Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that three true and correct copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari were deposited in the United States mail, with first-class postage prepaid this 2nd day of October, 1992, to: Gary L. Gardner, Assistant Attorney General, 6th Floor Broadway Bldg., P. O. Box 899, Jefferson City, Missouri, 65102.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

WXF898.KCM/kjb